

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original : English

No.: ICC-01/04-01/06
Date: 19 October 2006

PRE-TRIAL CHAMBER I

Before: Judge Claude Jorda, Single Judge

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
THE PROSECUTOR vs. THOMAS LUBANGA DYILO**

Public Document

URGENT

Prosecution's Response to Defence's "Request for an Order of the Pre-Trial Chamber to the Prosecution to provide legal argument to the Defence in advance of the confirmation hearing and for a variation of the time limit"

The Office of the Prosecutor

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Background

1. In its 5 October 2006 Decision¹ the Pre-Trial Chamber scheduled the date for the Confirmation Hearing for 9 November 2006.
2. On 16 October 2006, the Defence filed its "Defence Request for an Order of the Pre-Trial Chamber to the Prosecution to provide legal argument to the Defence in advance of the confirmation hearing and for a variation of the time limit",² (Request).

Discussion

3. The Prosecution submits that:
 - (a) The Request for the Prosecution to provide details of any legal arguments to be used at the Confirmation Hearing is not based upon the law of the International Criminal Court (ICC); and
 - (b) Pursuant to Rule 121(9) of the Rules of Procedure and Evidence (Rules) the Prosecution is not obliged to provide for legal argument; and

¹ "Décision sur la date de l'audience de confirmation des charges", public, 5 October 2006.

² "Defence Request for an Order of the Pre-Trial Chamber to the Prosecution to provide legal argument to the Defence in advance of the confirmation hearing and for a variation of the time limit", public, 16 October 2006.

- (c) Were the Prosecution to decide to present further legal/factual submissions for the Confirmation Hearing, the period of disclosure is in fact three days and not twenty.

The Request is not based upon the law of the ICC

4. It is the Prosecution's submission that the Defence Request does not have a foundational basis within the laws of the ICC.³

5. Furthermore, whilst the Defence refers analogously to the pre-trial processes of the ICTY,⁴ it is the Prosecution's submission that the pre-trial processes of the ICTY, in particular the requirement that the Prosecution produce a pre-trial brief, are not comparable to the confirmation proceedings at the ICC. The ICTY does not contain a Chamber endowed with the unique function of an ICC Pre-Trial Chamber to determine whether or not to commit a case to trial. Accordingly, it is premature at this stage for the Defence to assert that the Prosecution's legal arguments are necessary for a fair trial – any fair trial argument should be raised after the confirmation of charges during the pre-trial period.⁵

³ The Prosecution notes that the Defence in its Request does not cite any Article of the Statute or any Rule.

⁴ See Request, at para 5.

⁵ The Prosecution would also highlight that the Defence's reference to Rule 98 *bis* appears to be a misdirected citation as neither Rule 98 *bis* nor Rule 98 of the ICTY Rules address the provision of legal argument by an opposing Party.

The Prosecution is not under an obligation to comply with the Request

6. Rule 121(9) provides that the Prosecution "may" lodge additional written submissions on "points of fact and on law" to the Pre-Trial Chamber.
7. The Prosecution submits that that the permissive language of paragraph (9) of Rule 121 should be contrasted with the more mandatory language within the same Rule at paragraphs (3), (4) and (5) where it is stated that if the Prosecutor seeks to perform a certain action he "shall" provide to or notify the Pre-Trial Chamber with the information.⁶ Thus, upon a plain and ordinary interpretation of Rule 121, the Prosecution is of the view that the intention of the legislator was to place Rule 121(9) within the Prosecution's discretion as to whether it would exercise the right to lodge any written submissions on points of fact and/or law which would be additional to its prescribed obligations.
8. Furthermore, the Prosecution notes that the text of Rule 121(9) can be found in its exact current wording in previous draft versions of the Rules going as far back as 1999; each progressive year unchanged. The Prosecution therefore submits that it is possible to infer that from an early stage in the negotiations the text of this provision was not considered controversial amongst the drafters of the Rules and

⁶ See paragraph 3: The Prosecutor shall provide a detailed description of the charges with a list of evidence; paragraph 4: The Prosecutor shall notify the Pre-Trial Chamber and the person if he intends to amend the charges; paragraph 5: The Prosecutor shall provide the Pre-Trial Chamber and the person with a list if he intends to present new evidence.

thus the words of the provision should be given their plain and ordinary meaning.⁷

The period of disclosure for further legal/factual submissions is only three days

9. Irrespective of the above submissions that the Prosecution is not under an obligation, the Prosecution submits that Rule 121(9) is clear in its requirement that were the Prosecution to exercise a discretion to make further legal and/or factual submissions beyond its prescribed obligations, that it is required to provide copies of these submissions to the Pre-Trial Chamber and the opposing Party no later than three days prior to the Confirmation Hearing and not twenty as the Defence is seeking.

Request

10. For the foregoing reasons, the Prosecution requests that the Request be dismissed.




 Luis Moreno-Ocampo
 Prosecutor

Dated this 19th day of October 2006
 At The Hague, The Netherlands

⁷ The Prosecution furthermore draws to the attention of the Defence that it already made submissions on the facts and the law in the context of both its 12 January 2006 "Application for Warrant of Arrest, Article 58" and its 28 August 2006 "Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)."